IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant.

vs.

DIXON N. GARLINGER,

No. 166.

PETITION FOR REHEARING.

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Petition and Argument for Re-hearing.

The Attorneys for the Appellee believe, and hereby certify that they are of the opinion, that this court erred in directing the dismissal of the petition in the court below.

We think this court has misunderstood the facts, owing perhaps to an insufficient explanation on our part of the significance of the ultimate findings of the court below. We are partly led to this conclusion by a statement in the beginning of the opinion, viz:

> "For services he was entitled to be paid $3.00 per day for each and every day's work actually performed, and it is a *conceded* fact that he was so paid for every day he was in the service."

We respectfully submit that such fact is not conceded. The statement is misleading. While it is true that claimant was "entitled to be paid for each and every day's work actually performed," it is not "conceded" that he was so paid "for every day he was in the service."

It is the claimant's contention that a day's work is fixed by regulation, and that it consists of "one watch." If this be true, then the claimant has not been paid for every day's work "actually performed," or for every day he was in the service.

If "two watches," one following the other, are only one day's work, then he has been paid too much. On the theory that "two watches," or the regulation work of *two men*, is only one day's work, the claimant has been paid, during the time included in this suit, $765 too much. His service from April 1, 1882 to August 25, 1886 covers a period of 1,608 days. Upon the theory that "double service" is, by regulation, single service, he was in fact actually employed 1,353 days and off duty 255 days. He was paid for 1,608 days. If the conclusion of the Court is correct that two watches are one day's service, he would be entitled to be paid only for each day's work "actually performed" and not for the time when unemployed.

It is submitted and urged that in accordance with law, the claimant could only be entitled to be paid, as he was paid, for the 255 days when not actually employed, on the adopted construction of the regulations that "one watch" was a day's work.

"Two watches" actually performed in the same

twenty-four hours has been and is regarded, under the regulations, two days' work in 48 hours, "actually performed," and so paid.

These regulations of the Secretary of the Treasury prescribing what constitutes a day's work, are of general application and were and are in full force and effect at all the principal ports of the United States.

The duties of night inspectors were performed at night, were performed by "two watches," and separate inspectors were assigned to each watch. If, for any reason, an inspector was kept on duty during the period of two watches, he was relieved from duty the following night, and at the same time *paid for two days' work* "actually performed."

This condition of affairs has existed certainly since the regulations of 1871. In Portland, Me., Boston, New York, Philadelphia, and all the principal ports of the United States, alternate watches were assigned and paid for as day's work. With this variation in some cities, as in Boston and New York, the night was divided into alternate watches, while in other places, as in Philadelphia, alternate nights were assigned to different inspectors, one inspector being off duty every alternate night.

But whatever immaterial differences there may exist as to assignments, "one watch" is recognized as a days work at all principal ports, and is so paid for. If the rule is correct, as *substantially* stated in the opinion of the court, that where "two watches" following each other are performed by one man, it is only "one watch" for the reason that the work was performed in one calendar day.

then the organization of the night inspector force throughout the United States is unlawful, and hundreds of thousands of dollars have been and are being paid unlawfully.

In directing the petition to be dismissed, this court has subtantially held that the regulations of the Secretary of the Treasury, in dividing the night into watches and making each watch a day's work, are not in accordance with law.

1st. Because, as stated in the opinion, it is not "competent for the Secretary of the Treasury, by passing regulations to divide a day's service into parts, to attach to each part the pay for a full day's work."

It is a general custom, not only in the Treasury but in other Departments of the Government, as well as in ordinary business, to divide the calendar day into parts, and to pay for each part as a full day's work. *Examples;* watchmen in the Departments; laborers in mines, factories and iron and steel works. It is a matter of public noteriety that at some of the Navy Yards, at the present time, the workmen are working their "shifts." (See eight hour law, Public Printing Act, and Letter Carrier Act.) As to right of public officers to fix by agreement the hours of labor, under exigencies differing from a statute, see *Martin's case*, 94 U. S., 400.

The calendar day is divided into parts one for day inspectors, the other for night inspectors. Yet, it can hardly be assumed that the same man, under exigencies performing the same duties, would not be entitled to be paid for the service although rendered in the same calendar day.

The night, under the regulations, is divided into two parts or watches, each part recognized and paid as a day's work.

2nd. Because, as stated in the opinion, the purpose of section 2733, R. S., fixing $3.00 a day, in connection with section 1764, R. S., forbidding extra pay for extra service, "would be defeated if the regulation in question were to be construed as providing that a period of twenty-four hours might be so divided as to justify two or more payments, to the same person, of the amount fixed for the daily compensation."

Under the regulations exhibited to this court of the year 1871, for the government of officers under the surveyors of the port (p. 112) of 1875 (p. 136), of 1876 (p. 173), of 1877 (p. 166), and of 1883 (p. 127), the night watch is divided into two parts, each part to perform "one watch," and where for any reason the inspector performs two watches he is relieved from duty the following night.

Under construction of this regulation, night inspectors in all the principal ports in the United States perform two days' work in 24 hours.

This regulation is construed in connection with section 1764, R. S. If the time of the "one watch is extended" so that the night inspector is kept on duty until 10 o'clock in the morning (see Trans. Find. III, p. 5), he receives no additional or extra pay.

"One watch" being fixed by regulation, it is only to the extension or enlargement of the watch that section 1764 applies. It is to the "actual performance of the watch that the pay attaches."

3rd. The Court says:—"Nor do we think such a construction [that is, that one watch is a day's work] can be properly given to the regulation in question. Nothing is said therein of double pay in case the officer serves both watches."

No claim is made for "double pay." The claim is for the statutory pay for a day's work "actually performed." The uniform construction of the regulation has been and is, that where the night inspector performs *two* continuous watches on the same night, he shall not only be relieved from duty the following night, but he shall be paid for *two* days work.

This construction has been in force, certainly since 1871, and under it many hundreds of thousands of dollars have been paid, and it is recognized even at Baltimore, (See Trans. Find. III, p. 5.) It is found (Find. XII) to have been in force for the full term of claimant's employment.

The practice of the departments in the construction of a statute followed for many years is conclusive, except where the statute is explicit in terms. And this for the reason that statutes are frequently drawn by the officers whose duty it is to execute them. This specially applies to a regulation which is a rule formulated, promulgated and acted upon in the department in which it is issued, and under which payments have been appropriated uniformly by Congress.

4th. The Court says:—"It is not found that the claimant ever demanded during the period of his service the compensation he now seeks. What he complained of was that, after he had performed an all-night service he was not excused from duty the following night."

It is stated substantially that he could have left the service, but he concluded to remain and to receive the compensation awarded him by the collector.

He is within the rule of *Baker vs. Nachtrieb*, 19 How., 126; Child's Case, 12 Wall., 232; *DeArnaud's Case*, 151 U. S., 438.

If appellee, in the performance of "one watch," "actually performed" one day's work, he had a legal right under the regulations, as uniformly construed and therefore having the force and effect of law, to be paid $3.00 for his day's work. His right was a legal right not dependent upon demand. The neglect of the collector to pay his just dues does not imply any surrender, waiver or abandonment of his legal rights. His wages being established by law, even a receipt in full could not be regarded as an abandonment of his claim. He was entitled to his daily wages as fixed by law, and the collector would be without right to demand a receipt in full.

In *Adam's case*, 20 C. Cls., 115, the collector had fixed the wages of certain night inspectors at $2.50 instead of $3.00 per day, and required a receipt in full. The court held that the action of the collector was unauthorized, either in reduction of wages or demand for receipt in full. (See cases therein cited.) The decision in that case was accepted and acted upon by the department.

The case of *Baker vs. Nachtrieb*, 19 How., 126, depended upon the fact whether the contract with the "Harmony Society" had been concluded under the terms of a certain paper and receipt. The case was *sui generis*, *Child's case*, 12 Wall., 232, related to an unliquidated account. *DeArnoud's case*, 151 U. S., 483, was an account presented by DeArnoud to the Secretary of War for settlement. The amount, if any due, until fixed by the Secretary of War, was unliquidated. It was fixed by the Secretary as payment in full, and was so paid and so receipted.

5th. The court says:—"Such a principle [of implied change of contract by the claimant] is

especially applicable to the transactions of the government, whose expenditures are met by legislative appropriation."

Where a salary is fixed by law, the want of an appropriation therefor, or an appropriation for a less amount than the legal salary, and the receipt of the amount so appropriated, does not constitute a surrender of the legal right.

6th. The Court says:—"It is legitimate to infer that such payments were made and received on the understanding of both parties that they were in full. Such presumption is very much strengthened by the lapse of two years before the appellee thought fit to make any demand."

Taking the extreme view that the appellee assumed that full justice had been done him, and that he received his payments upon that understanding, notwithstanding he had been furnished with a copy of the regulations defining his duties and his rights, and that he only became aware of his rights two years after his employment ended, he still would have the right to present his legal claim for adjudication.

Re-settlements of accounts in the departments are frequent years after the accounts were supposed by both parties to be settled and payments received as in full, without protest. This has specially been the case in Army and Navy accounts after decisions of this court. The want of actual knowledge of the legal right, has never yet been assumed or asserted to be a surrender or waiver of such legal right. To invoke the jurisdiction the Court of Claims, the suit must be brought within six years after the claim accrues. The legal right remains after six years,

but as against the United States there is no legal tribunal to enforce such legal right, except by special legislation, which is frequently asked for and granted.

If a suit is brought within the statutory period of *six* years, the doctrine of *laches* can hardly be invoked at the expiration of *two* years.

It is respectfully submitted that the regulations of the Secretary of the Treasury are fully authorized under the provisions of section 261, R. S., and have the force and effect of law. Even if the authority to issue the regulations were doubtful or ambiguous, a continuous construction of the regulations combined with official action for a long series of years by those carrying the regulations into effect (embracing, as has been shown, the port of Baltimore) would, under the many familiar decisions of this court, give such regulations the force and effect of law.

It is respectfully submitted that neither "additional pay" nor "extra pay" is asked by the claimant. If "one watch" is a day's work either by law or regulation, then the Secretary of the Treasury was legally justified in the organization of the night inspector force, and in asking appropriations from Congress on the basis of "one watch" being a day's work. If "one watch" *is* a day's work, it follows that the demand for payment is neither for "additional" nor "extra pay," because such payment is authorized by regulations under provisions of sections 2,733, 2,738, and is not in contravention of section 1,764, R. S.

The latter section applies to cases where the night inspector, under exingencies, is assigned to

duty early in the afternoon, instead of at 5 o'clock, or, as is frequently the case, compelled to remain on duty until 10 in the morning (Finding 111, Trans. 5). For such extra hours the inspector is not entitled to claim additional or extra compensation, under section 1,764 R. S.

Such construction of this section in no degree would be in conflict with *Hoyt's case*, 10 How. 141; *King's case*, 147 U. S., 676; *Mullett's Admx.*, 150 U. S. 566, or any authority therein cited.

The opinion states:

> "We are unable to accept the contention that it was competent for the Secretary of the Treasury, by passing regulations, to divide a day's service into parts, and to attach to each part the pay for a full day."

Why not? It is customary to do so, both in the public Departments and in private business. For example, for watchmen the official day in the Departments is 8 hours. Their usual watch is *first* from 8 A. M. to 4 P. M.; *second* 4 P. M. to 12 midnight; *third* from 12 midnight to 8 A. M. Each watch is a day's work and is so paid. The right to divide the day has never been questioned. Examples might be multiplied. In mines, factories, and many private employments, the day is usually divided into three "shifts," each "shift" being a day's work. It is customary at navy yards and arsenals to do so.

To designate one man to perform two watches, or two day's work, might be and probably is inexpedient, but the work to the one man is not "additional" or "extra" in the sense of section

1764, R. S., for it would be the performance of a specific duty established by regulation and usage.

The night is so divided by the regulations as to require the payment of two day's work to two persons. If one man does the work of two, it is difficult to understand why he should not be paid accordingly. There is no reason against it. It is the ordinary business custom. It costs the Government no more to pay one man the same pay for the same work as is ordinarily paid two men for the same work. It is true, as stated in the opinion, that nothing is specifically stated in the regulations of "double pay in case the officer serves both watches." But we submit that such is its obvious meaning and, as before stated, such is the uniform construction placed upon the regulations by the Treasury Department for very many years.

give *six* years to bring suit in the Court of Claims. The lapse of six years does not mean a surrender of the right, it only deprives a claimant of a forum in which to bring suit, which forum is often-times given jurisdiction by Congress, notwithstanding the statute of limitations, after the lapse of many years.

Where the office is created, the duties prescribed, and the compensation fixed by law, the rights of the officer to receive pay for the performance of the prescribed duties have attached, and are independent of the appointing power. *Converse's case*, 24 How, 463; *Lawson's case*, 101 U. S., 164; *Ellsworth's case*, 101 U. S., 170; *Hall vs. Wisconsin*, 103 U. S., 5.

It is submitted that protest against "double work" impliedly carries with it a demand for pay for "double work." The Collector of the Port

paid the amount appropriated, and a demand for payment in excess of the appropriation would have been futile. The law does not require an idle thing. The protest against "double work" certainly does in no way accord with the theory that there was a waiver or surrender of legal rights. To protest against the one is to demand the other.

Where the law or regulation fixes the compensation, demand for the amount is not necessary. The law is the contract. In the case of wages or salary the law is not a contract that may not be repealed or changed, for by law a new contract may be substituted. But until there is such repeal or change of the law, or regulation having the force of law is made, the contract remains under the original law or regulation. *Butler vs. Pennsylvania*, 10 How. 402.

Even an appropriation by Congress for a less amount than a salary fixed by law, does not relieve the Government from the legal obligation to pay the full salary. *Langston case*, 118 U.S., 389. It will be observed that Langston did not bring suit until after his employment as Minister was at end. Cases are frequently brought upon salaries after the claimant is out of office. That they are not brought before, may be for the very good reason that the claimant was fearful of jeopardizing his position. In some cases it is because they are not at the time cognizant of their legal rights. Payments on contracts are often received, under the ruling of the accounting officers, and the legal rights of the parties determined after the contract is finished. Simple acquiesence in no way changes a legal right. The statute

The observed rule is that, if a night inspector does duty one night he is relieved from duty the following night and receives two day's pay, in recognition of the fact that "two days" work has been "actually performed," even though such work is in the same calendar day.

But a protest is not necessary, as was held in *Adams case*, 20 C. Cls. 115. *If the legal right existed, even a receipt in full demanded without authority, would not extinguish it.*

Where a claim is founded upon a mere technicality, Courts frequently disregard the technicality in order to administer substantial justice. But there is no reason, we submit, in a case like the present, to cast doubt upon a long line of decisions, uniformly decided, as well as a long and uniform practice of the Departments.

Claimant asks no more than is freely accorded to night inspectors in all the principal ports of the United States. In all such ports "one watch" is regarded as a day's work, and "two watches" done in the same twenty-four hours are paid as two days' work.

As has been shown, the legality of the regulation is recognized at Baltimore. It is not shown in defence, is not pretended, and it is not the fact, that the duties of night inspectors at Baltimore differ in any respect from the duties of night inspectors at Boston, New York, Philadelphia, or other principal ports. The same reasons that apply to the division of watches in other ports apply to Baltimore. There is no reason given, nor does any exist, why the night inspectors at Baltimore

should, in opposition to the regulations, be regarded and treated other than night inspectors elsewhere.

These regulations the inspectors are furnished with, not only as to instructions as to their duties, but also as defining their rights. Thus the law and the contract were put in their hands.

The attorneys for appelle, under the belief that they can show to this court, by a long and unbroken line of decisions, as well as by the regulations, and the construction thereof by the departments, that the judgment of the court below is right, repectfully ask and urge that a re-hearing be granted.

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